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The Honorable Barbara J. Rothstein

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY, a political subdivision of the State of Washington; Plaintiff; vs. JOHN RASMUSSEN and NANCY RASMUSSEN, husband and wife, and their marital community; Defendants.	**No. C00-1637R** BRIEF OPPOSING KING COUNTY MOTION FOR SUMMARY JUDGMENT (on quiet title and declaratory judgment requests by plaintiff) **[Noted for Hearing on April 20, 2001; *Oral Argument is Requested*]**

The issues in this case are complex, and of the greatest magnitude, not only for the parties in this action, but to over 450 homeowners similarly situated. It

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is respectfully requested this court grant leave for oral argument in this matter. The defendants respectfully request leave to file an over-20 page memorandum in this most complex case.

I. BACKGROUND

This action was removed from King County Superior Court, and no motion for remand was timely filed, nor should remand have been sought, since this action is replete with federal questions. The defendants are seeking relief from King County's intrusion into their private lives, and, (among other misconduct), the unwarranted, illegal violation of their property rights by King County. King County claims it bought "a strip of land" that defendants claim eviscerates the two waterfront lots vested in the defendants, in a transaction filled with back-room politics worthy of Prohibition Era Chicago gangster leadership. No discovery has occurred, and now the county seeks this court's intervention to cover up its misdeeds.

II. FACTS

1. Bill Hilchkanum was an Indian. At the very best he was functionally illiterate, and "made his mark" when he signed legal documents. Thus, all drafting of any ambiguous documents was completed by the railroad's representative. In this case Bill Hilchkanum and his wife signed a document that did not comport with the necessary elements for conveyance of a fee simple interest, because of the qualifying and limiting language of the document. There is no evidence of any clear, unmistakable intent by the railroad's representative that Bill Hilchkanum

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was informed he was giving away the fee simple interest to land Bill Hilchkanum was proving up under the federal homestead laws. According to the Rasmussens' expert witnesses, Stephen Graddon and Roger Hayden, the Hilchkanum deed conveyed an easement, not a fee title. Declaration of Steve Graddon, dated April 6, 2001, Exhibit 1 ("Ownership Research Report dated September 25, 1999").

2. The Hilchkanum document, entitled "*Right of Way Deed*", described a "*right of way* strip" as a "*centerline*" which was "fifty (50) feet in width on each side of the centerline", and described the use of the "*right of way*" to be for "*the location, construction and operation*" of the Seattle Lake Shore and Eastern Railway. The centerline "*of the railway track*" was to be "located across *our said lands"* and the centerline was described in metes and bounds format. According to the Rasmussens' expert witnesses, Stephen Graddon and Roger Hayden, the Hilchkanum deed conveyed an easement, not a fee title. Declaration of Neil DeGoojer, dated Feb. 15, Exhibit 1 ("Verbatim Copy of Hilchkanum Deed"); Decl. of Steve Graddon, dated April 6, 2001, Exhibit 1 ("Ownership Research Report dated September 25, 1999"); Exhibit 2 ("Chronological Chain of Ownership Documents – Prepared for John and Nancy Rasmussen"), at Tab C.2 (*emphasis added*).

3. Although plaintiff King County claims it owns a "strip of land" in fee simple, rather than a railroad easement, and that the "strip of land" *bisects* and is *adjacent* to defendants' real property, the Rasmussens hold fee simple title, according to their deed, for two adjacent waterfront lots, the *perimeters* of which

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are described in metes and bounds. The Rasmussens' vested fee simple estate, described in metes and bounds, *encompasses* the "strip of land" in which the county claims vested fee simple ownership. According to the Rasmussens' expert witnesses, Stephen Graddon and Roger Hayden, the Hilchkanum deed conveyed an easement, not a fee title. Decl. of Steve Graddon, dated April 6, 2001, Exhibit 2 ("Chronological Chain of Ownership Documents – Prepared for John and Nancy Rasmussen"), at Tab A.

4. Before Burlington Northern Santa Fe Railway Company ("BNSFR") permanently ceased operations on the rail line which is the subject of this action, the rail line had been used for more than twenty (20) years as a spur line, with essentially only one shipper, and with no through connections to interstate rail lines. The spur line ended in Issaquah, Washington, and connected to the BNSFR railway in Redmond, Washington. Decl. of John Rasmussen, dated April 9, 2001.

5. Neither the United States Surface Transportation Board, ("USSTB") nor its predecessor, the Interstate Commerce Commission, ("ICC"), has any power or authority to control or regulate a spur line such as the one BNSFR allegedly sold to The Land Conservancy of Seattle and King County ("TLC") on April 23, 1997. Decl. of John Rasmussen, dated April 9, 2001; Exhibit 6 (Quit Claim Deed from BNSFR to TLC, dated April 23, 1997).

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6. In an undated "Petition for Exemption" before the U.S. Surface Transportation Board, TLC deceptively described the spur line[1] as a "rail corridor", instead of a "spur line" and requested the USSTB to exercise jurisdiction to issue an order of abandonment and railbanking for the property it claimed BNSFR had sold to TLC on April 23, 1997. The BNSFR easement expired with the abandonment of the BNSFR spur line in August 1996. It certainly was extinguished when TLC acquired the non-existent easement in the attempted conveyance on April 23, 1997. John Rasmussen Decl., dated April 9, 2001, Exhibit 11, at pp. 8, 12.

7. The defendants claim that the attempts to railbank the railroad easement abandoned by BNSFR have clouded the title to the defendants' real property, and that the county is promoting that wrongful conduct with its assertion of ownership rights to the defendants' real property. The defendants have provided a set of over-view maps, and owner-specific maps, for this court's assistance in resolving this summary judgment motion, and visualizing the parties' conflicting claims. Declaration of John Rasmussen, dated September 2, 2000, Exhibit 7 to Scott Johnson decl. of Feb. 15, 2001; and John Rasmussen decl. dated April 9, 2001; Decl. of Steve Graddon, dated April 6, 2001, Exhibit 1 ("Ownership Research

[1] The USSTB did not issue any enforceable order involving this spur line, because it lacked subject matter jurisdiction to do so. 49 USC §10906. This court has plenary power to consider a challenge to subject matter jurisdiction, and this court has specific statutory authority to determine whether or not to enforce the USSTB orders. 28 USC §1336(a) and (b).

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Report dated September 25, 1999"); Exhibit 2 ("Chronological Chain of Ownership Documents – Prepared for John and Nancy Rasmussen"), at Tabs B and E.

8. Plaintiff King County conducted a title analysis of a title report provided King County, by an employee who had title search experience (DeGoojer?), in 1996, concerning the Hilchkanum deeds as they relate to the East Lake Sammamish Trail project, and the King County Office of Open Space Title Officer who conducted the title analysis observed the acquisition was solely for "an interim trail use permit". The title analysis of the Rasmussen property included the following remarks by the county expert:

> "…8. Terms of Northern Pacific Land Grant Act of 1864: The Act is not applicable to this case since the *right of way* was acquired from private parties, not from the federal government.
>
> 9. Vesting: The report is vested in the railroad, but *the interest proposed to be insured is not necessarily fee simple but may be in the nature of an easement.* This depends on the nature of the interest held by the railroad which depends in turn on the interest acquired by the railroad. The particular *deed under which this property was acquired was entitled "right of way deed" which would probably be deemed to be an easement interest*

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only[2]*. The commitment disclaims liability on the issues relating to the nature of the interest acquired.*

10. Reversionary rights: *If the interest acquired by the railroad was in the nature of an easement, the interest would terminate when the right of way ceased to be used for its intended purpose and the interest would revert to the last person whose deed is interpreted to include the right of way* [Note: in this case, the Rasmussens]."

Declaration of John Rasmussen, dated April 9, 2001, Exhibit 3 ("King County Office of Open Space Title Officer's Review of Title Report") at "comments on special exceptions" (emphasis added).

9. Defendant John Rasmussen attempted to start a dialogue with King County officials for approximately fifteen (15) months commencing with his e-mail correspondence of April 9, 1999 through the fateful e-mail correspondence of August 9, 2000 and August 24, 2000 to King County Councilman David Irons and King County Executive Ron Sims, respectively. He demanded clarification of the

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[2] In plaintiff's brief there is an analysis of the "Simpson deed", from *Brown v. State*, 130 Wn. 2d 430, 924 P.2d 908 (1996), where the Simpson deed was entitled "Right of Way Deed". Thereafter the similarities between the Simpson deed and the Hilchkanum document fade into nonexistence. See Part II, paragraphs 1-3 with citations, *supra. See also, King County v. Squire Investment Co.*, 59 Wn. App. 888, 801 P.2d 1022 (1990); *Northlake Marine Works v. Seattle*, 70 Wn. App. 491, 857 P.2d 283 (1993) (*deeds similar to the Hilchkanum conveyance for Rasmussen property have been found to be easements in Washington).*

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county's legal position *vis a vis* the waterfront property owned by the Rasmussens, all to no avail. Declaration of John Rasmussen, dated September 2, 2000, at pp. 15-113, Exhibit 7 of Scott Johnson's declaration dated February 15, 2001.

10. Although John Rasmussen originally considered that King County had a railbanked easement for preserving the use of the easement for railroad purposes, as he described in his September 2, 2000 declaration at page 11, further research and investigation has clarified that King County owns nothing: the county purchased an illegal, unenforceable easement claim, passed down to the county from an ineligible nonprofit corporation, because the easement had been extinguished through BNSFR's abandonment of the railway. John Rasmussen declaration of April 9, 2001; Decl. of Steve Graddon, April 6, 2001, Exhibit 1 ("Ownership Research Report dated September 25, 1999"); Exhibit 2 ("Chronological Chain of Ownership Documents – Prepared for John and Nancy Rasmussen").

11. John Rasmussen carefully studied the BNSFR – TLC – King County property transfer documents. He studied the Arthur Anderson appraisal of the spur line commissioned by BNSFR. He learned the following:

(a) Before the sale of the spur line right of way, BNSFR paid Arthur Anderson LLP of Chicago, Illinois to provide a formal appraisal of the 12.45 miles of spur line, and the appraisal evaluated the spur line at $41,760,000.00 as of December 10, 1996. Arthur Anderson listed the special assumption as: "…*we have assumed BNSFR has fee simple*

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title for the land. However, we understand that the title is not marketable in all cases. Because the condition of the title is unknown, we assumed fee simple title at the clients (sic) request."

(b) In the April 15, 1997 purchase and sale agreement executed by BNSFR and TLC for the spur line, at pp. 12-13, the parties agreed that "*BNSFR hereby disclaims any representation or warranty, whether express or implied, as to the***quality of title to the rail line.***[TLC] accepts, the rail line in "as is, where is" and "with all faults" condition, and subject to all limitations on BNSFR's rights, interest, and title to the property comprising the rail line".*

(c) In the purchase and sale agreement *rough draft*, tentatively agreed upon by BNSFR and TLC for the spur line, at p. 6, the parties agreed that "…*the fair market value of the rail line is $41.7 million pursuant to an independent appraisal of the Rail Line…*". The parties agreed that this was "…*substantially higher than the consideration paid hereunder…*".

(d) In the April 15, 1997 final draft of the purchase and sale agreement executed by BNSFR and TLC for the spur line, at p. 6, the parties omitted any reference to the Arthur Anderson independent appraisal actual value, and merely recited that the true value was "*substantially higher*" than what TLC was paying for the BNSFR spur line property rights. TLC, as in any IRC §501(c)(3) charitable donation transaction,

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agreed to fully cooperate with BNSFR to assist BNSFR in claiming an IRS tax deduction with regard to the bargain sale. The sale price was $1,500,000.00, for a charitable donation IRS tax deduction of $40,260,000.00 in favor of BNSFR.

(e) Shortly before the BNSFR – TLC sale agreement was executed, John Couch, Director of Parks and Recreation for the City of Redmond disseminated a January 13, 1997 City of Redmond memorandum, which was used at a public meeting, which had an addendum provided by King County (in reference to the spur line in this case) "*Currently we believe the Railroad owns one 1500 lineal foot section of the trail. The rest of the route is held by the Railroad in a right of way easement*". When King County released its records concerning this documentation under the Freedom of Information Act, the county's addendum concerning *fee simple ownership versus right-of-way easement* had been removed. Mr. Rasmussen concluded that it was no accident the addendum had been altered, because 1,500 lineal feet would be only 2.3% of the spur line. Mr. Rasmussen concluded BNSFR, TLC and King County probably had participated in a massive income tax fraud, using his real property, and the real property of his neighbors on the spur line, as the engine that drove that fraudulent scheme. He further concluded that BNSFR, TLC and King County officials must have been informed of the questionable tax write-off, because of the intertwined relationships of the individuals involved in

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transferring the BNSFR spur line property rights to King County, through the TLC conduit[3].

Declaration of John Rasmussen, dated April 9, 2001, Exhibits 4, 5 and 6.

12. On August 11, 1999 Mr. Rasmussen contacted King County Sheriff Dave Reichert, by e-mail, and requested police assistance to protect the Rasmussens, and their property, from illegal trespass by county officials and third parties acting in concert with those county officials. On Friday the 13th, August, 1999, Sheriff Reichert responded through a subordinate: "*…Aside from enforcing court orders, I am not empowered to enter into civil disputes such as the dispute you and your neighbors are in with the County over the Sammamish Trail. My deputies will keep the peace and enforce any applicable court orders…*". Scott Johnson decl., dated Feb. 15, 2001, Exhibit 7, pp. 51-52.

13. After fifteen months of fruitless monologue with county officials, Mr. Rasmussen again implored county officials to enter a meaningful dialogue with him concerning the county's intentions in the face of Mr. Rasmussen's claims the county had no legal rights to interfere with his waterfront property, all to no avail. The open hostility of county employees as they trespassed over the Rasmussen properties had increased dramatically (see the life-threatening episode where John Rasmussen was at risk of being killed by a county employee in a jeep vehicle, described in Rasmussen's April 9, 2001 declaration).

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[3] Mr. Eugene Duvernoy was a former King County employee, involved in county land acquisitions and condemnations. As the corporate representative for TLC, he spearheaded meetings between TLC and BNSFR, and TLC and King County, concerning the spur line property rights acquisition for King County.

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Mr. Rasmussen had been informed months before his fateful e-mail declarations in August 2000 that the sheriff refused to provide police support for the Rasmussens, when trespassers confronted the Rasmussens. In frustration, Mr. Rasmussen informed county officials that if he did not receive some meaningful response, that he would meet trespassers at his property line, and repel all illegal trespassers, using all necessary (and legal) force to do so. Mr. Rasmussen informed the county officials that he would bear arms and explained the gun was for his protection. Mr. Rasmussen informed county officials that he would give the county 72 hours' notice *before* he took up his arms to defend himself from trespass and assault[4]. Declaration of John Rasmussen dated September 2, 2000, Exhibit 7 of Scott Johnson decl. dated Feb. 15, 2001; John Rasmussen decl. dated April 9, 2001.

III. ISSUES

1. *Are there genuine issues of material fact that preclude summary judgment?*

2. *Should the parties engage in mandatory mediation before an assigned federal magistrate of this Court?*

3. *Should discovery be conducted before this matter is ripe for motion practice?*

IV. ARGUMENT

1. <u>King County has failed to show that all material facts are uncontested, and the defendants have produced evidence of fee title ownership sufficient to present at trial.</u>

[4] All facts and inferences therefrom are viewed in the light most favorable to the non-moving party. *Warren v. City of Carlsbad,* 58 F.3d 439, 442 (9th CCA, 1995).

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The Rasmussens, as nonmoving parties, are entitled to every reasonable inference in their favor to construe that they have fee title to the contested real property. *Warren v. City of Carlsbad*, 58 F.3d 439, 442 (9th CCA, 1995). Thus, in analyzing the Hilchkanum deed, the facts that (a) the grantor was an illiterate Native American Indian, obviously unschooled in easement and fee title conveyances, and that (b) the drafter of the deed [the railroad representative] created an ambiguous instrument, (c) not in conformance with the then-existing Statute of Deeds, should be sufficient to satisfy this Court that the Hilchkanum deed cannot conclusively be deemed to have conveyed a fee simple title to Seattle Lake Shore and Eastern Railway Company (SLS&E) that merits summary judgment.

But there is much, much more. A grant of a strip of land to a railroad company "for right of way and for operating its railroad only," conveys merely an easement. *Morsbach v. Thurston County*, 152 Wash. 562, 569, 278 Pac. 686 (1929). When the granting clause of a deed declares the purpose of the grant to be a right-of-way for a railroad the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title. *Swan v. O'Leary*, 37 Wn.2d 533, 537, 225 P.2d 199 (1950).

"The conveyance of a right of way to a railroad may be in fee simple or only an easement. Where only an easement for a right of way is concerned, and its use for such purpose ceases, the land is discharged of the burden of the easement and the right to possession reverts to the original landowner or to that landowner's

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successors in interest; the right to possession does not go to grantees and successors in interest of the railroad company." *Roeder Co. v. Burlington Northern*, 105 Wn.2d 567, 571, 716 P.2d 855 (1986). In this case, the Rasmussens are the successors in interest to Hilchkanums, and the fee resides with them, since BNSFR abandoned this spur line. *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308 (1986).

King County v. Squire Investment Co., 59 Wn. App. 888, 801 P.2d 1022 (1990) clarifies the habendum clause issue, obfuscated by the county's arguments:

"…The Squire deed granted a 'right-of-way fifty (50) feet in width through said lands'. This suggests an easement was conveyed. Both King County and Squire note, however, that the habendum clause contains the handwritten language, 'or so long as said land is used as a right-of-way by said railway Company,' which arguably suggests conveyance of a fee simple determinable. <u>If the granting clause merely conveyed the land to the railroad without reference to a right of way, the 'so long as' language would create such a fee</u>. Since the language in the granting clause strongly suggests conveyance of an easement, however, we find it more plausible that the 'so long as' language was inserted by Squire to preclude the claim that he conveyed a fee simple to the railroad, particularly since the habendum clause granted the interest to the railroad and 'to its successors and assigns forever'. The authorities and cases discussed above clearly support construing the Squire deed as an easement." *King County v. Squire Investment Co. supra*, at 894. In the instant case, King County would have this Court gloss over

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the Hilchkanum deed's *grant* of a "right-of-way", using sleight-of-hand analysis that suggests this does not support the grant of an easement. In fact, the Hilchkanum deed's granting clause "strongly suggests conveyance of an easement", and therefore just as the *Squire* deed's habendum clause was not construed as a fee conveyance, neither should the Hilchkanum's habendum clause be construed as anything other than the conveyance of an easement. Hilchkanum conveyed the "right-of-way" for "*the location, construction and operation*" of the Seattle Lake Shore and Eastern Railway. This clarifies the purpose of the "right-of-way". Hilchkanum's deed even referenced the "right-of-way" as passing "*across our said lands*". Hilchkanum's deed referenced the land, where the "*right-of-way*" for "*the location, construction and operation*" of the railroad passed over, as being "*our***lands*" [meaning "Hilchkanums' lands", not "the railroad's lands"]. Thus, the trackage was to pass across the land reserved in ownership by the Hilchkanums---this is the fundamental operation of an easement. King County's motion for summary judgment should be denied.

The county's seminal case does not prove the county's case; in fact, quite the contrary: "These cases are consistent with the majority of cases that hold the use of the term 'right of way' as a limitation or to specify the purpose of the grant generally creates only an easement." *Brown v. State*, 130 Wn.2d 430, 439, 924 P.2d 908 (1996). In Hilchkanum's deed, the term "right-of-way" was used in *both* the granting clause, and the heading of the deed. This "strongly suggests conveyance of an easement". *King County v. Squire Investment Co. supra*, at 894.

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Compare the Hilchkanum deed to the *Roeder* deeds, and see how Hilchkanum's deed differs from those of *Roeder:*

"Because the words 'right of way' appeared only in each deed's legal description or in the description of the railroad's obligations, instead of in the granting or habendum clauses, the court concluded that [u]sed in this manner, 'right of way' merely describes a strip of land acquired for rail lines; it does not qualify or limit the interest expressly conveyed in the granting and habendum clauses." *Roeder Co. v. K&E Moving,* 102 Wn. App. 49, 54-55, 4 P.3d 839 (2000). Hilchkanum is readily distinguished, and clearly supports the conclusion an easement was granted to the railroad. An examination of the Hilchkanum and Simpson deeds[5] will show that *Hilchkanum grants* a "right-of-way" for railroad purposes in its granting clause and *Simpson does not.* Further, the quote directly above from *Roeder* III indicates that the *Roeder* III deeds fail to compare to Hilchkanum in that respect, also. The issue of whether a right of way is granted for railroad purposes in the granting clause is critical to comparing these deeds. The county's summary judgment motion should be denied.

The court should ascertain and enforce the intention of the original parties to a deed. To do this, the court should derive the intent from the whole instrument. If ambiguity exists, the court should consider the situation and circumstances at the time of the grant. "In general, when construing a deed, the intent of the parties is of

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paramount importance and the Court's duty to ascertain and enforce." *Brown v. State*, 130 Wn.2d 430, 437, 924 P.2d 908 (1996). "…[T]he intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case." *Swan v. O'Leary*, 37 Wn.2d 533, 535, 225 P.2d 199 (1950). "The intent is to be derived from the whole instrument, and if ambiguity exists, the situation and circumstances of the parties existing at the time of the grant are to be considered." *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). If Hilchkanum was proving up a homestead claim, and he had not yet received his fee simple absolute title *patent* to the homestead, would he really jeopardize his homestead application by granting away part of the homestead fee title before he even acquired title[6]? Of course not. The interest described in the Hilchkanum deed

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[5] The Simpson deed is found with the Declaration of Scott Johnson in Support of K.C. SJM, Exhibit 4; the Hilchkanum deed is found with the Neil Degoojer Declaration, Exhibit 1, and the Graddon declaration.

[6] Since there was no "after-acquired property" savings clause in the Hilchkanum deed, and the deed was "signed" [by Hilchkanum's "mark"] and "delivered" before Hilchkanum received his fee simple absolute title patent to the land at issue, the railroad's claim cannot survive this defect. A quitclaim deed *purporting to convey more than present interest of grantor* may operate as conveyance of after acquired title. *Ankeny v. Clark*, 1 Wash. 549, 20 P. 583 (1889), aff'd, 148 U.S. 345, 13 S. Ct. 617, 37 L. Ed. 475 (1893). An habendum clause in a quitclaim deed does not convey after acquired title. *Brenner v. J. J. Brenner Oyster Co.*, 48 Wn.2d 264, 292 P.2d 1052 (1956), aff'd, 50 Wn.2d 869, 314 P.2d 417 (1957). A bond for a deed made by patentee, prior to issuance of patent, is not a conveyance, and insufficient to pass after acquired title. *Turner v. Ladd*, 42 Wash. 274, 84 P. 866 (1906). Hilchkanum's deed did not pass after-acquired title: the railroad received no interest by Hilchkanum's "mark".

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was an easement…if it existed at all.

Is the Hilchkanum deed ambiguous? The tortured analysis provided by King County's conduct, BNSFR's actions, and TLC's attempts to identify some sort of "title" to this property should impeach any suggestion the deed is clear and unambiguous. "Generally, the question of whether a written instrument is ambiguous is a question of law for the court. *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 411 P.2d 868 (1966). An ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole. *Green River Vly. Found., Inc. v. Foster*, 78 Wn.2d 245, 249, 473 P.2d 844 (1970). The term 'ambiguous' has been defined as 'Capable of being understood in either of two or more possible senses'. *Ladum*, at 116, quoting Webster's New International Dictionary (2d ed.)." *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). In this case Hilchkanum cannot be faulted for "making his mark" on an ambiguous deed to the railroad. The deed should be construed against its drafter, the railroad. This was an easement…if anything at all.

What kind of deed was this Hilchkanum deed? Mr. Hilchkanum had no vested fee title to the real property interest conveyed by the Hilchkanum deed, at the time of execution of the deed. At the very most, it must have been a quitclaim deed, conveying the easement, *if Hilchkanum could convey the easement*, otherwise the warranties of title would have been expressed. A quitclaim deed does

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not operate to convey after-acquired title. RCW 64.04.050 [1929 c 33 § 11; RRS § 10554; Prior: **1886** p 178 § 5]; *Brenner v. J.J. Brenner Oyster Co.*, 48 Wn.2d 264, 292 P.2d 1052 (1956) (aff'd on rehearing, 50 Wn.2d 869, 314 P.2d 417 (1957)). It necessarily follows that a clause in a quitclaim deed expressing an intention to convey after-acquired interests will have the effect of passing such interests to the grantee. RCW 64.04.070; *Brenner v. J.J. Brenner Oyster Co., supra.* But in this case, no expression of an intent to convey after-acquired interests exists in the Hilchkanum deed. King County has nothing. If it wants to take the Rasmussens' property, then it should pay the Rasmussens for their property. Washington Constitution, Article 1, Section 16 (Amendment 9).

Setting aside this analysis of after-acquired title, and assuming *arguendo* that King County has created an *imbroglio* concerning the nature of the interest passed from Hilchkanum to the railroad in this case: the analysis of easement characteristics must lead to the conclusion nothing more than an easement existed in the Hilchkanum conveyance.

"In determining whether the property owners have met their burden of showing that the original parties intended to adapt the statutory form to grant easements instead of fees simple, we have relied on the following factors:

> (1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed;

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(2) whether the deed conveyed a strip of land and limited its use to a specific purpose;
(3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof;
(4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land;
(5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor;
(6) whether the consideration expressed was substantial or nominal; and
(7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed. *Swan, supra*, 37 Wn.2d at 535-36.

In addition to the language of the deed, we will also look at the circumstances surrounding the deed's execution and the subsequent conduct of the parties. *Scott v. Wallitner*, 49 Wn.2d 161, 162, 299 P.2d 204 (1956); see also *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993), cert. denied, 114 S. Ct. 697, 126 L. Ed. 2d 664 (1994)." *Brown v. State*, 130 Wn.2d 430, 438, 924 P.2d 908 (1996).

Applying the factors and principles discussed above to the Hilchkanum and Simpson deeds *will prove that the deeds are not similar in any significant way, contrary to King County's claim:*

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To determine the intention of the parties to the deeds, we consider the instrument as a whole by applying the factors listed in *Brown* at 438. But first, we look for the words 'right of way' in the deeds and determine if those words are used to limit the interest granted, or merely to describe the strip of right of way land.

Are the words "right of way" used in these railroad deeds, and how are they used?

Hilchkanum: Yes. The granting clause states:

"In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King in Washington Territory we do hereby donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a right of way one hundred (100) feet in width through our lands in said County described as follows to wit

Lots one (1) two (2) and three (3) in section six (6) township 24 North of Range six (6) East.

Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands by the Engineer of said railway Company which location is described as follows to wit." [Survey description of the railroad centerline follows.]

In the Hilchkanum deed, the words "right-of-way" are used in *both ways.* They are used as language to *limit the grant* in the first paragraph: "… we do hereby

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donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a right of way one hundred (100) feet in width through our lands…".
In the third paragraph of the Hilchkanum deed, the words are merely used *to describe the property*: "… Such right of way strip to be fifty (50) feet in width…".

The use of the words "right of way" to limit and qualify the grant in the first paragraph of Hilchkanum is the strong evidence of an easement that the Washington State Supreme Court was looking for in the deeds it construed in the *Brown* case. The Court did not find those words in any of the 37 private deeds it examined in that case. The *Roeder* III court did not find those words to limit the right of way grant either, as shown above.

Simpson: Yes. The words "right of way" appear in the Simpson deed *only to describe the property, not to limit the grant.* This use of the words does not indicate an easement. This is explained in *Brown v. State*, 130 Wn.2d 430, 441-442, 924 P.2d 908 (1996).

"(1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed;"

Hilchkanum: No. The Hilchkanum deed granted strips of land, but the deed does include language that limits the grant to an easement.

Simpson: Yes. Simpson meets this test that would indicate that fee simple title was passed with the deed.

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"(2) whether the deed conveyed a strip of land and limited its use to a specific purpose;"

Hilchkanum: Yes. Hilchkanum limited the grant to an easement by granting a right of way for railroad purposes in the granting clause.

Simpson: No. Simpson did not limit the grant. This would suggest that fee title was passed.

"(3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof;"

Hilchkanum: Yes and no. Hilchkanum conveyed a strip of land, but the deed also described how the railroad right of way went "across our lands" which strongly suggests an easement..

Simpson: No. Simpson also granted a strip of land, without further clarification, as distinguished from Hilchkanum.

"(4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land;"

Hilchkanum: Yes. The words "In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway…" show that the right of way grant was for railroad purposes only. This is consistent with a railroad easement.

Simpson: No. Simpson did not limit the grant to railroad use. This suggests a grant of fee simple title.

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"(5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor;"

Hilchkanum: No. A clause of this nature would support the idea of it being an easement. However, this language is not required in the Hilchkanum deed to qualify it to be an easement because the granting clause grants a right of way for railroad purposes, and there is no other language in the deed that would counter that strong evidence. The clause referred to here is normally found in the habendum. The habendum may be used to define the extent of ownership, but with Hilchkanum, this has already been defined in the granting clause. This clause is not necessary to confirm Hilchkanum to be an easement, but would be further reinforcement if it were there.

Simpson: No. There is no language in the Simpson deed that would cause it to revert to the grantor. This would continue to support the idea that Simpson passed fee title.

"(6) whether the consideration expressed was substantial or nominal;"

Hilchkanum: No. Hilchkanum was paid no consideration for the grant of the easement. This suggests and supports the idea that this deed was an easement.

Simpson: Yes. Simpson was paid $700 for his land, a significant sum in those days. This would support the idea that this was a transfer of fee title.

"(7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed."

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Hilchkanum: Yes. The habendum clause is "standard" with Hilchkanum. "To have and to hold the said premises with the appurtenance unto the said party of the second part and to its successors and assignors forever". Since the granting clause already granted an easement, the habendum would serve the function to *lessen, enlarge, explain or qualify* that grant. It takes none of these roles and leaves the grant of an easement unaltered and intact. In *Swan, supra,* the deed was found to be an easement with a similar habendum as shown here: "To Have and to Hold, All and singular the said premises together with the appurtenances, unto said part*y* of the second part, and to *his* heirs and assigns forever" *Swan v. O'Leary*, 37 Wn.2d 533, 533-534, 225 P.2d 199 (1950).

Simpson: No. The Simpson deed does not have a habendum in the commonly understood sense. There are no parts of this deed that limit the grant to a railroad right of way.

Are the Hilchkanum and Simpson deeds on all fours? Clearly, they are not. Does the Hilchkanum deed "strongly suggest conveyance of an easement". Yes, it does. The county's summary judgment motion should be denied.

Comparing the Hilchkanum and Squire deeds:

If the Hilchkanum and Simpson deeds are dissimilar, is there a deed that closely resembles the Hilchkanum deed? The *Squire* deed, granted by Watson and Ida

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Squire to SLS&E on March 29, 1887 is very similar to the Hilchkanum deed. The following shows the essential elements of the *Squire and Hilchkanum* deeds.

Squire deed:

"In Consideration of the benefits and advantages to accrue to us from the location, construction and operation of the Seattle Lake Shore and Eastern Railway, in the County of King, in Washington Territory, we do hereby donate, grant and convey unto said Seattle Lake Shore and Eastern Railway a right-of-way Fifty (50) feet in width through said lands in said County, described as follows, to-wit: [legal description].

Such right-of-way strip to be twenty-five (25) feet in width on each side of the center line of the railway track as located across the said lands by the Engineer of said Railway Company, which location is described as follows, to-wit [description.]

To Have and to Hold the said premises, with the appurtenances, unto the said party of the second part, and to its successors and assigns forever or so long as said land is used as a right-of-way by said railway Company, Expressly reserving to said grantors their heirs and assigns all their riparian rights and water front rights on the shores of Lake Washington. And this grant is upon the condition that said railway shall be completed over said lands on or before January 1st, 1888". *King County v. Squire Investment Co.*, 59 Wn. App. 888, 890, 801 P.2d 1022 (1990).

Hilchkanum deed:

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" In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King in Washington Territory we do hereby donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a right of way one hundred (100) feet in width through our lands in said County described as follows to wit [legal description.]

Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands by the Engineer of said railway Company which location is described as follows to wit. [description.]

And the said Seattle Lake Shore and Eastern Railway Company shall have the right to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all trees dangerous to the operation of said road.

To have and to hold the said premises with the appurtenance unto the said party of the second part and to its successors and assignors forever."

Why would King County try to compare the Hilchkanum deed to the Simpson deed, when the Hilchkanum deed and the Squire deed are almost identical? Consider the following quote from *Squire*:

"King County acknowledges that the original deed conveyed a fee simple determinable or a *right of way easement*. It contends, however, that the limitation within the deed, which conveyed the property "so long as said land is used as a right-of-way by said railway Company," was never violated, despite Burlington

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Northern's formal abandonment, because the railroad once carried passengers traveling for recreation, just as a trail would. It further argues that the trial court's holding promotes forfeitures and any reverter rights were personal to Watson and Ida Squire. We disagree." *King County v. Squire Investment Co.*, 59 Wn. App. 888, 892, 801 P.2d 1022 (1990).

King County ignores the Squire deed because it destroys its claim to ownership of the Rasmussens' property. Here are the similarities between Hilchkanum and Squire:

- Both deeds granted a right of way to SLS&E for railroad purposes using the *same wording*. This very strongly suggests an easement.
- Both deeds granted strips of land and limit its use to a specific purpose, using the *same words.*
- Both deeds granted only the privilege of constructing, operating, or maintaining a railroad over the land, using *exactly the same words*.
- Both deeds were granted with nominal consideration. Neither Hilchkanum nor Squire was paid any monetary compensation for their easements. They both granted a right of way for the "benefits and advantages to accrue", rather than a cash amount. Again, *exactly the same words* were used.
- Both deeds were established with the same circumstances surrounding the deed's execution and the subsequent conduct of the parties because they were *established just five weeks apart, on the same railroad line*.

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One *minor difference* between the deeds is that Squire had a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor. Hilchkanum did not have such a clause. In *Squire* that statement is in the habendum. Since the granting clause of the Hilchkanum deed already specified a right of way for railroad purposes, the habendum in this case only serves the purpose of explaining or qualifying that grant. That clause simply reinforces the reversionary language already in the granting clause, and is not necessary to prove the deed an easement.

The *Squire* case also addressed the unconditional habendum clause:

"…In *Veach v. Culp,* the court construed a deed which granted a right of way and used the standard habendum clause language, but without the additional language conditioning use of the property on its continued use as a railroad right of way. The successor railroad argued that the absence of such limiting language showed a fee was conveyed. The *Veach* court disagreed, holding that the language of the deed which described the conveyance of a right of way indicated an easement had been conveyed." *King County v. Squire Investment Co.*, 59 Wn. App. 888, 894, 801 P.2d 1022 (1990). Hilchkanum gave the railroad an easement, if anything at all.

King County's claim to fee simple ownership of the Rasmussens' land under the former BNSFR right of way is without merit. The deeds from *Brown* and *Roeder* III that King County uses to compare to the Hilchkanum deed have very little correlation to the Hilchkanum deed. *King County v. Squire Investment Co.*, 59

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Wn. App. 888, 801 P.2d 1022 (1990) should be controlling, because of the close similarities between the deeds, and because the principles for construing deeds are unchanged. *Brown* and *Roeder* III simply reiterate basic real estate law. R.C.W. 64.04.010 *et seq.*

The "excepting out" language must be viewed in the totality of the circumstances in this case, and does not destroy the nature of the grant as an easement:

> In determining the nature of the estate created by the instrument, the intention of the grantor may be determined from (a) the language of the instrument, (b) the circumstances surrounding its execution, and (c) the subsequent conduct of the parties with relation to the property. *Scott v. Wallitner*, 49 Wn.2d 161, 299 P.2d 204 (1956). King County focused on subpart (c) to the exclusion of subparts (a) and (b), and then ignored the conduct of the grantees of the Hilchkanum easement. This imbalanced approach to analyzing *Scott v. Wallitner, supra*, skews the rule of construction: the subsequent conduct *of the parties* clearly shows BNSFR has not warranted its title to the contested property in any manner. BNSFR refused to prove its fee title to Arthur Anderson LLP and this fact became a "special assumption" in the appraisal report. See Exhibit 4 of John Rasmussen decl. dated April 9, 2001. See, also the BNSFR final sale agreement to TLC, Exhibit 6 to Rasmussen decl. of April 9, 2001: "*no representation has been made by Seller to Buyer concerning the state, condition or quality of title of the Premises,*" and "Buyer ACCEPTS THE PREMISES IN "AS IS, WHERE IS" AND "WITH ALL

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FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON Seller's RIGHTS, INTEREST, AND TITLE TO THE PROPERTY COMPRISING THE PREMISES". Query: if BNSFR really understood it had fee simple title to this contested property, why would it go to the trouble of deceiving USSTB into ruling on abandonment and railbanking of this spur line, when USSTB had no subject matter jurisdiction to railbank this property? The corollary: why would BNSFR go to the trouble of characterizing its fee simple title as a mere easement, and an eligible candidacy for railbanking? The *conduct of the parties* clearly shows the grantees of the easement treated the estate as an easement and *not* fee title.

One final comment about the "excepting out" issue: an examination of the subsequent Hilchkanum property transfers indicates that the Rasmussens' real property did not have any "excepting out" language in the granting clause. See Exhibit 2 to Graddon declaration, Tab 4 (1900-1909), "Bill Hilchkanum et ux to Chris Nelson" warranty deed dated March 15, 1904 [Book of Deeds, Vol. 382 Page 457 (AF #291395)]. The county's expert witness, DeGoojer, has provided this Court with a Hilchkanum deed that has a limited "excepting out" clause *that is not in the chain of title to the Rasmussen real property* [it covers Lot 1, *not* Lots 2, 3 and 5, *see* Graddon decl., Exhibit 2, Tab. 8]. Charitably, the county has committed an error. Even when analyzing the erroneous Hilchkanum deed's "excepting out" clause, the county overstates its effect: the language states "less three acres heretofore conveyed to the Seattle & International Railway *for right of way purposes*". See "Bill Hilchkanum to Chris Nelson" warranty deed, dated

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February 27, 1904 [Book of Deeds, Vol. 382 Page 200 (AF #289603)], Scott Johnson decl. dated Feb. 15, 2001, Exhibit 5.

King County has failed to prove there are no material questions of fact, and the Ramussens have provided this Court ample factual bases to deny the county's summary judgment motion. FRCP 56(c). The county's motion should be denied.

2. The parties should be ordered to mandatory mediation with the mediation assistance of a federal magistrate assigned by this Court:

The Rasmussens have been requesting a dialogue with King County officials for over two years, now. The only dialogue has been litigation. Unfortunately, King County has deluded itself into believing it has nothing to lose in this litigation, and that it can allocate unlimited taxpayers' resources to crush individual property owners such as the Rasmussens. These parties need to sit and negotiate their concerns in good faith, in an environment free from political posturing, and with a view towards issue resolution. The county officials want to provide a trailway for the citizens of King County. The Rasmussens want fair and reasonable compensation if they must give up their dream home on the waterfront of Lake Sammamish for this public use of their property. This court should require each side to come to the bargaining table in good faith to resolve these most serious issues.

3. Discovery should be completed before this motion practice is presented for resolution:

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In twenty-four years of trial practice this counsel has never seen such a rush to judgment when the stakes are so high. This Court has been presented with facts that are in serious contention, and some of which should raise the ire of any jurist. To consider the potential fraud visited upon the people of these United States by railroads seeking tax relief at the expense of America's working people who diligently pay more than their fair share of income taxes is maddening[7]. There needs to be more discovery concerning the "back-room politics worthy of Prohibition Era Chicago gangster leadership" described in this case. The expert witnesses should be carefully examined by deposition. None of this has occurred. FRCP 56 calls for adequate discovery rather than placing this Court in the uncomfortable position of having to extrapolate the facts from "sleight-of-hand" declarations. This summary judgment motion is premature, and should be denied.

V. CONCLUSION

The Rasmussens have proved they own their waterfront property free from any claims of BNSFR, TLC or King County. King County has prematurely sought summary judgment to quiet title to the Rasmussens' waterfront property. King County then seeks declaratory judgment concerning the legality of a claimed easement, when material facts are in contention [the Rasmussens have briefed the

[7] This Court has the authority to issue instructions to the I.R.S. to investigate the I.R.C. §501(c)(3) nonprofit corporation involved in this litigation, and the BNSFR "aggressive" charitable contribution described in the evidence before this Court. The Rasmussens seek *qui tam* compensation for any recovery, through the federal False Claim Act.

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legality of their fee simple position in both this memorandum and the memorandum opposing FRCP 12(b) motions to dismiss, and thus there is no need to reiterate their position in response to the county's premature request for declaratory judgment]. The parties have never engaged in meaningful dialogue, for over two years. This court should order the parties into mandatory mediation, allow for adequate discovery of contested material facts, and deny the county's motions.

Respectfully submitted this 12th day of April, 2001.

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_____

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